UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

GLADYS MONAHAN,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 98-183-P-H***
	)	
CHAPMAN & DRAKE, et al.,	***)***	
	)	
Defendants	***)***	

MEMORANDUM DECISION ON PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT AND RECOMMENDED DECISION ON DEFENDANTS' MOTIONS TO DISMISS OR FOR SUMMARY JUDGMENT

The plaintiff, a former employee of defendant Chapman & Drake, has moved for leave to amend her complaint (Docket No. 9). All but one of the defendants oppose this motion on the ground that the proposed amendment would be futile. In addition, Defendants John D. Chapman, Spencer E. Gray, Jr. and Margaret E. Ealahan have moved to dismiss Count Three and to dismiss, or for summary judgment on, Count Four (Docket No. 3); defendants Chapman & Drake and C & D Liquidation Corp. have moved to dismiss, or for summary judgment on, Count One and to dismiss all counts based on state law (Docket No. 7); and defendant Blaine P. Horne has moved to dismiss Counts Three and Four (Docket No. 18)[1] and for summary judgment on Count Four (Docket No. 19). I deny the motion for leave to amend, grant Horne's motion to convert, and recommend that the court deny the corporate defendants' motion and grant the motions to dismiss Count Three and for

[1] Horne has since moved to convert this motion into one for judgment on the pleadings (Docket No. 22).

summary judgment on Count Four filed by the individual defendants.[2]

I. Applicable Legal Standards

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International*

[2] The plaintiff has also requested oral argument on the pending motions. Docket No. 21. Because the written submissions of the parties are sufficient for fully and fairly resolving the issue raised, I deny the request for oral argument.

Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr., 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

The motions to dismiss brought by the individual defendants are based on Fed. R. Civ. P. 12(b)(6). "When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending the plaintiff every reasonable inference in [its] favor." *Pihl v. Massachusetts Dep't of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). The defendant is entitled to dismissal for failure to state a claim "only if it clearly appears, according to the facts alleged, that the plaintiff cannot recover on any viable theory." *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990); *see also Jackson v. Faber*, 834 F. Supp. 471, 473 (D. Me. 1993). The court applies the same standard to a motion for judgment on the pleadings. 5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1367 at 515 (2d ed. 1990); *see also Slotnick v. Garfinkle*, 632 F.2d 163, 165 (1st Cir. 1980).

II. Factual Background

A. For the Motions to Dismiss

The complaint asserts claims against Chapman & Drake, a Maine corporation that employed the plaintiff from September 1994 to May 15, 1996, Complaint (Docket No. 1) ¶¶ 8, 15; C & D Liquidation Corp., a Maine corporation that is the successor corporation to Chapman & Drake, *id*. ¶¶ 9-10; John D. Chapman, Blaine P. Horne and Spencer E. Gray, Jr., owners and employees or agents of Chapman & Drake, *id*. ¶¶ 11-13; and Margaret E. Ealahan, an owner and the administrative manager of the office of Chapman & Drake located in Bath, Maine, *id*. ¶ 14. The claims arise under 42 U.S.C. § 2000e *et seq*., also known as Title VII of the Civil Rights Act of 1964; various

provisions of the Maine Human Rights Act, 5 M.R.S.A. § 4551 *et seq*.; and Maine common law. The complaint alleges that the plaintiff filed a timely charge of sex discrimination and retaliation with the Maine Human Rights Commission and requested that it be filed with the Equal Employment Opportunity Commission ("EEOC"), that the Maine Human Rights Commission dismissed the charge on August 22, 1997, and that the plaintiff's request for a right to sue letter is pending with the EEOC. Complaint ¶¶ 5-6.

The complaint alleges that the plaintiff was subjected to a hostile work environment created by defendant Horne's conduct of an affair with a female supervisor while both were married. *Id*. ¶¶ 17-18. It also alleges that this female supervisor was subjected to "unwanted sexual acts" by three other male employees and that the individual defendants were aware of the hostile environment created by these incidents. *Id*. ¶ 19. It alleges that "management" harassed and threatened employees who attempted to report, discuss or complain about the affair and the hostile environment. *Id*. ¶ 20. The plaintiff was fired on May 15, 1996 by defendant Gray in the presence of defendants Chapman and Ealahan for "betraying confidentiality." *Id*. ¶ 33.

Count One alleges that the corporate defendants violated Title VII. *Id*. ¶¶ 37-39. Count Two alleges that the corporate defendants violated Sections 4566, 4572 and 4633 of the Maine Human Rights Act. *Id*. ¶¶ 37-39 [sic]. Count Three alleges that all of the defendants are liable to the plaintiff for violation of her rights under the Maine Constitution. *Id*. ¶¶ 37[sic]-40. Count Four alleges that all defendants negligently inflicted emotional distress on the plaintiff. *Id*. ¶¶ 36-38 [sic]. Count Five alleges breach of contract by the corporate defendants. *Id*. ¶¶ 36[sic]-43.

B. For the Motions for Summary Judgment

The summary judgment record contains the following appropriately supported undisputed facts. A document entitled "Equal Employment Opportunity Commission, Dismissal and Notice of Rights" dated September 19, 1997 and addressed to the plaintiff with a copy to "Executive Officer, Chapman & Drake Insurance," was received by defendant Gray "a few weeks" after he received a written statement of findings from the Maine Human Rights Commission concerning a charge filed by the plaintiff. Affidavit of Spencer Gray ("Gray Aff.") (Docket No. 6) ¶¶ 5-6 & Exh. B. A fact-finding conference was held by the Maine Human Rights Commission on the plaintiff's charge against Chapman & Drake on May 27, 1997. Affidavit of Margaret Coughlin LePage (Docket No. 5) ¶¶ 3, 6. Following that hearing, counsel for Chapman & Drake received a document entitled "Statement of Finding" from the Maine Human Rights Commission and dated August 22, 1997. *Id*. ¶ 7.

Throughout the proceedings before the Maine Human Rights Commission the plaintiff was represented by the same law firm that represents her in this action. *Id*. ¶ 5. On May 4, 1998 counsel for the plaintiff wrote to the EEOC requesting a right to sue letter. Sworn Affidavit of Counsel, Susan V. Wallace ("Wallace Aff."), Exh. E to Plaintiff's Opposition and Supporting Memorandum Re: Motion to Dismiss by Defendants C & D Liquidation Corp. and Chapman & Drake ("Plaintiff's Opposition") (Docket No. 13), ¶ 3 & Exh. B to Plaintiff's Opposition. On May 22, 1998 the EEOC faxed to the office of the plaintiff's counsel a copy of the Dismissal and Notice of Rights dated September 19, 1997. Wallace Aff. ¶ 4. The plaintiff had never seen this document before May 26, 1998 and was not aware that her charge had been dismissed by the EEOC before May 13, 1998. Affidavit [of Gladys Monahan], Exh. D to Plaintiff's Opposition, ¶¶ 3, 6.

Chapman & Drake had in place at all relevant times a workers' compensation and employers' liability insurance policy. Gray Aff. ¶¶ 3-4.

III. Discussion

A. The Motion to Dismiss Count One

The corporate defendants have moved to dismiss Count One on the grounds that it is untimely and that the complaint fails to comply with Fed. R. Civ. P. 9(c) because it does not allege that the action was filed within 90 days after receipt of a right-to-sue letter from the EEOC. Rule 9(c) states that "[i]n pleading the performance of occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred." According to the corporate defendants, filing within 90 days of the receipt of a right-to-sue letter, as required by 42 U.S.C. § 2000e-5(f)(1), is a condition precedent to filing a lawsuit invoking Title VII. Here, the complaint alleges:

> 5. The Plaintiff GLADYS MONAHAN timely filed a charge of sex discrimination and retaliation with the Maine Human Rights Commission ("MHRC") and requested filing with the Equal Employment Opportunity Commission ("EEOC") within 180 days of the act complained of.
>
> 6. It has been more than 240 days since the filing of said charges by the Plaintiff, and the MHRC dismissed the case on August 22, 1997, and Plaintiff's request for a right to sue letter is pending with the EEOC, copies appended hereto as Exhs. A and B.

The latter statement was correct according to the affidavits of the plaintiff and her counsel at the time the complaint was first filed on May 18, 1998. They learned a few days later that a right-to-sue letter had apparently existed since September 19, 1997.

The relevant portion of 42 U.S.C. § 2000e-5(f)(1) provides:

> If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section . . . or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved . . . .

The conditions precedent to filing an action under Title VII are not jurisdictional but rather akin to a statute of limitations, subject to waiver, estoppel and equitable tolling. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (filing charge with commission); *Davidson v. Service Corp. Int'l*, 943 F. Supp. 734, 737 (S. D. Tex. 1996) (90-day period for filing in court).

Rule 9(c) does not require anything more than a general allegation that all conditions precedent have been fulfilled. *Stearns v. Consolidated Management, Inc.*, 747 F.2d 1105, 1111 (7th Cir. 1984). Here, the plaintiff could not have specifically alleged filing within 90 days of receipt of the EEOC notice at the time the complaint was filed. The complaint alleges fulfillment of all conditions precedent known to the plaintiff to have been required at that time because, according to her affidavit, she was unaware that a right-to-sue letter had been issued. Her failure to allege the specific circumstances regarding the right-to-sue letter in her proposed amended complaint does not require dismissal of her claim, contrary to the corporate defendants' argument. *See Griffin v. Dugger*, 823 F.2d 1476, 1482 n.12 (11th Cir. 1987) (failure to satisfy conditions precedent, standing alone, does not deprive federal court of subject matter jurisdiction). It will be necessary to consider matters outside the pleadings to resolve the issue concerning the right-to-sue letter in this case. Summary judgment, rather than dismissal for failure to comply with Rule 9(c), is the appropriate vehicle under the circumstances.

The plaintiff argues that the 90-day limit should be equitably tolled because she did not receive the right-to-sue letter from the EEOC. The corporate defendants' position is that it is "all too easy for a Title VII litigant to claim after the fact that she did not receive the right to sue letter in a timely fashion or that she did not receive it at all," Motion to Dismiss and/or For Summary Judgment on Count One for Lack of Timeliness and to Dismiss Remaining State Law Counts and Incorporated Memorandum of Law ("Motion to Dismiss Count One") (Docket No. 7) at 7, and that because the plaintiff was represented throughout by counsel, a duty of diligence imposed upon a claimant required the plaintiff's counsel to know that the EEOC "would take no more action on her charge and would dismiss it on or after the 15th day following dismissal by the MHRC," *id*. at 9. Because the plaintiff's counsel did not contact the EEOC until more than eight months after the Maine Human Rights Commission dismissed the plaintiff's claim, the corporate defendants argue, the plaintiff has failed to act with due diligence to protect her rights, and the 90-day limitations period should not be equitably tolled. They rely on *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 151 (1984) ("One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence."), and *Lopez v. Citibank, N.A.*, 808 F.2d 905, 907 (1st Cir. 1987), to support this argument.[3]

In this case, there is no admissible evidence before the court that the right-to-sue letter was ever sent to the plaintiff by the EEOC.[4] The plaintiff's sworn affidavit states that she did not receive

[3] The corporate defendants and the plaintiff have cited numerous unpublished opinions in connection with this motion. Counsel are reminded that the First Circuit has directed that unpublished opinions are never to be cited in unrelated cases, including litigation before district courts. *Bachelder v. Communications Satellite Corp*., 837 F.2d 519, 523 n.5 (1st Cir. 1988). This court thus cannot rely on any such opinions, even as persuasive authority. *People's Heritage Sav. Bank v. Recoll Management, Inc*., 814 F. Supp. 159, 163 n.8 (D. Me. 1993).

[4] The corporate defendants have appropriately objected, Reply Brief of Defendants C & D Liquidation Corp. and Chapman & Drake to Dismiss Count One (Docket No. 16) at 1 n.1, to the (continued...)

the letter before filing this action, nor was she contacted by the EEOC. While the corporate defendants may consider it "easy" for a litigant to lie under oath about such facts, that opinion does not render the plaintiff's sworn statement anything less than a disputed issue of material fact with regard to the issue of equitable tolling. In this summary judgment record, the plaintiff's statement is in fact undisputed. In addition, the corporate defendants' argument concerning the duty of the plaintiff's counsel to contact the EEOC within the first 90 days following the dismissal of her charge by the Maine Human Rights Commission is not supported by the authority they cite. In *Baldwin County* the plaintiff seeking to invoke equitable tolling had received a right-to-sue letter from the EEOC and had been told twice by the court that she had to file suit within 90 days of the receipt of the letter, yet she failed to do so. 466 U.S. at 151. In *Lopez*, the plaintiff argued that mental problems prevented him from filing suit within the limitations period, despite having received the appropriate notice, but the court found that he had been represented throughout the period by counsel capable of pursuing the claim on his behalf and therefore was not entitled to equitable tolling. 808 F.2d at 907. Each case is easily distinguishable on its facts from the case at hand.

The corporate defendants also rely on *Neal v. Xerox Corp*., 991 F. Supp. 494, 500 (E. D. Va. 1998), to support their argument that the asserted lack of diligence on the part of the plaintiff's counsel may be charged to her and thus justify summary judgment for the defendants as a result of a failure to bring this action within 90 days after the date on the right to sue letter. However, *Neal* is also distinguishable. In that case, the Title VII plaintiff's lawyers entered into a stipulation of dismissal of the plaintiff's first Title VII action against the defendant, which had been filed within 90

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[4](...continued)
hearsay presented in the affidavit of the plaintiff's counsel concerning the EEOC's usual practices concerning such letters, Wallace Aff. ¶¶ 5-7, and none of that factual material may be considered here.

days of her receipt of a right-to-sue letter from the EEOC. 991 F. Supp. at 495. Two days after the dismissal, the lawyers refiled the action. *Id*. at 496. The defendant's motion to dismiss the second action on the ground that it had been filed more than 90 days after receipt of the right-to-sue letter was granted despite the plaintiff's arguments that the filing of the first action tolled the limitations period and that she had not authorized her lawyers to dismiss the first action. *Id*. at 496-98. Charging a party with the effect of her lawyers' decision to dismiss an action after they had been warned by opposing counsel that such a dismissal might affect their ability to refile the action, *id.* at 495-96, is quite different from denying the plaintiff in this case the ability to assert a claim because her lawyer did not contact the EEOC early and often concerning a notification that the plaintiff expected to receive as a matter of course from the EEOC. Earlier contact with the EEOC by the plaintiff's counsel would clearly have been preferable, but under the circumstances counsel's delay cannot operate to deny the plaintiff the opportunity to invoke equitable tolling as a matter of law.

This result is not inconsistent with the First Circuit's admonitions that "equitable tolling is reserved for exceptional cases," *Chico-Velez v. Roche Prod., Inc.*, 139 F.3d 56, 59 (1st Cir. 1998) (Americans with Disabilities Act claim), and that "in this circuit, we hew to a narrow view of equitable exceptions to Title VII limitations periods," *Rys v. United States Postal Svc*., 886 F.2d 443, 446 (1st Cir. 1989) (internal quotation marks and citation omitted). In *Chico-Velez* the circumstances were essentially those set forth in *Neal*, 139 F.3d at 58-59, and in *Rys* the plaintiff argued that he was confused by the language of the notice that he received from the EEOC, an argument that was belied by the structure of his complaint, 886 F.2d at 446-47. Here, the plaintiff has sworn that she never received any notification from the EEOC. *Cf. Cook v. Providence Hosp.*, 820 F.2d 176, 179 (6th Cir. 1987) (plaintiff had actual knowledge that right-to-sue letter had been issued 16 months before she

filed suit, evidence established that letter was mailed to plaintiff one year before that; under these circumstances, fact that plaintiff did not receive copy of letter until two years after it was issued and less than 90 days before filing suit did not justify equitable tolling). It is difficult to imagine how a notice could be more "inadequate." *Baldwin*, 466 U. S. at 151.

The corporate defendants also seek dismissal of the state-law claims asserted against them in the complaint, based on their argument that the court should not exercise supplemental jurisdiction over such claims when any claims based on federal law are no longer part of the case. Because they are not entitled to summary judgment on or dismissal of Count One, the only federal claim in the complaint, on the bases argued in their motion, the corporate defendants are not entitled to dismissal of the state-law claims. In addition, they are not entitled to the attorney fees they seek pursuant to 42 U.S.C. § 2000e-5(k) or Fed. R. Civ. P. 11.

I recommend that the corporate defendants' motion to dismiss or for summary judgment as to Count One and to dismiss the state-law claims be denied in its entirety.

B. Motions Concerning Counts Three and Four

Defendants Chapman, Gray and Ealahan have moved to dismiss or for summary judgment on Counts Three, which raises a claim against all defendants under the Maine Constitution, and Four, which alleges negligent infliction of emotional distress against all defendants. Docket No. 3. Defendant Horne has filed a motion to dismiss both counts, Docket No. 18; a motion for summary judgment on Count Four, Docket No. 19; and a motion to treat his motion to dismiss as one for judgment on the pleadings, Docket No. 22.[5] Because Horne has already filed an answer to the

[5] The plaintiff opposes this latter motion on the ground that the motion essentially seeks to (continued...)

complaint, Docket No. 2, his request that his motion to dismiss be treated as one for judgment on the pleadings is necessarily made pursuant to Rule 12. As previously noted, the same legal standard is applicable to both types of motion. Horne's motion to convert his motion to dismiss into one for judgment on the pleadings is granted.

1. Count Three. Count Three asserts a private cause of action under the Maine Constitution. The plaintiff specifies that her state constitutional claims "are for infringement of her rights under article 1, §§ 1 and 6-A, to life, liberty and the pursuit of happiness, due process and equal protection." Plaintiff's Opposition and Supporting Memorandum re: Motion to Dismiss and/or For Summary Judgment by Defendants John Chapman, Spencer Gray and Margaret Ealahan ("Plaintiff's Opposition to Chapman Motion") (Docket No. 11) at 3 n.2. There is no sense in which the complaint can be read to allege that any of the individual defendants deprived the plaintiff of her life or liberty. Alleged deprivation of the right to pursue happiness, standing alone, has not been the subject of any reported opinions of the Maine Law Court. Allegations of deprivation of due process of law or equal protection of the laws have usually been made against governments or public agencies, or against persons acting under color of state law.

The plaintiff relies on dicta in *Phelps v. President & Trustees of Colby College*, 595 A.2d 403 (Me. 1991), to support her argument that she has a direct cause of action against private individuals

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[5](...continued)
convert the motion to dismiss into a motion for summary judgment, which would be inappropriate at this early stage of the proceedings. Plaintiff's Opposition and Supporting Memorandum re: Defendant Blaine P. Horne's Motion to Treat His Motion to Dismiss Under Rule 12(b)(6) as a Motion for Judgment on the Pleadings Under Rule 12(c) (Docket No. 24) at 2-5. Since Horne has already filed a motion for summary judgment on Count Four (Docket No. 19), this objection must be addressed only to his motion to dismiss insofar as it concerns Count Three. In any event, the objection misperceives the nature of a motion for judgment on the pleadings under Rule 12(c), which is quite different from a motion for summary judgment under Rule 56. *See generally* 5A C. Wright & A. Miller, *Federal Practice and Procedure* §§ 1367-68 (2d ed. 1990).

for deprivation of rights guaranteed by the Maine Constitution. In that opinion, the Law Court held that the Maine Civil Rights Act, 5 M.R.S.A. § 4681 *et seq*.,[6] provides no remedy against private parties for interfering with the exercise or enjoyment of the rights of free expression or association. 595 A.2d at 403. "Considering both the language of the Act and the legislative history, it is evident that the Act was intended to remedy existing rights rather than create, for the first time, a right of free expression and free association applicable to relationships between private parties." *Id*. at 406. The plaintiff focuses on the Law Court's statement that "[r]ights under the Maine constitution may arguably be protected against private actions," *id*. at 407, which is followed immediately by a citation to article 1, § 3 concerning freedom of religion. This is hardly an indication, however, that the rights to due process and equal protection, traditionally applicable only against public defendants and those acting under color of state or federal law, *see, e.g.*,*Gonzales v. Commissioner, Dep't of Public Safety*, 665 A.2d 681, 683 (Me. 1995) (due process), *Onat v. Penobscot Bay Med. Ctr.*, 574 A.2d 872, 875 (Me. 1990) (both), extend under the Maine Constitution to relationships between private parties.

This court stated in 1995, well after the Law Court had issued its opinion in *Phelps*, that "Maine's Law Court has never recognized a cause of action for damages based solely upon violation of the Maine Constitution." *Pew v. Scopino*, 904 F. Supp. 18, 32 (D. Me. 1995). That observation remains correct.[7] In *Andrews v. Department of Environmental Protection*, the plaintiff asserted a

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[6] Section 4682 of the Maine Act provides, in pertinent part: "Whenever any person, whether or not acting under color of law, intentionally interferes or attempts to intentionally interfere by physical force or violence against a person . . . with the exercise or enjoyment by any other person of rights secured by . . . the Constitution of Maine or laws of the State . . . , the person whose exercise or enjoyment of these rights has been interfered with . . . may institute and prosecute in that person's own name . . . a civil action for legal or equitable relief."

[7] The plaintiff states that this fact makes it appropriate and necessary for this court to certify to the Maine Law Court the question whether the Maine Constitution provides her with a private (continued...)

claim against several individual defendants under article 1, section 4 of the Maine Constitution. 1998 ME 198 ¶ 21. The Law Court held that this provision, guaranteeing the right of free speech, "cannot support a private cause of action," *id.*, and that the Maine Civil Rights Act, creating a private cause of action for violation of a person's rights under the Maine Constitution, even though it is limited to instances of force or violence, is the sole source of such a cause of action under Maine law, *id.* ¶ 23. The Law Court "decline[d] to expand the available remedies for a violation of rights guaranteed by the Maine Constitution beyond those which the Legislature in its wisdom has provided," *id.*, and this court is bound by that holding. The claims asserted against the individual defendants in Count Three must be dismissed.

2. Count Four. Count Four raises a claim of negligent infliction of emotional distress against the individual defendants. They seek summary judgment on this claim on the basis of the immunity and exclusivity provisions of the Maine Workers' Compensation Act, 39-A M.R.S.A. § 101 *et seq.*

These statutory provisions include the following relevant language:

> An employer who has secured the payment of compensation in conformity with sections 401 to 407 is exempt from civil actions, either at common law or under [various] sections [of the Maine statutes] involving personal injuries sustained by an employee arising out of and in the course of employment, or for death resulting from those injuries. . . . These exemptions from liability apply to all employees, supervisors, officers and directors of the employer for any personal injuries arising out of and in the course of employment, or for death resulting from those injuries.

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[7](...continued)
cause of action against private defendants for deprivation of her rights to due process and equal protection of the laws, pursuant to M. R. Civ. P. 76B. Plaintiff's Opposition at 8-9. To the contrary, the point made in *Pew* and reinforced by the Law Court's recent opinion in *Andrews v. Department of Environmental Protection*, 1998 ME 198 (Me. Aug. 3, 1998), is that it is clear that the Law Court would not rule in the plaintiff's favor on this issue. Certification is not appropriate under the circumstances of this case. *See Grant's Dairy, Inc. v. McLaughlin*, ___ F. Supp.2d ___, 1998 WL 566001 at *4-*5 (D. Me. Aug. 31, 1998).

39-A M.R.S.A. § 104.

> Except as provided in subsection 2 [dealing with illegally employed minors], an employee of an employer who has secured the payment of compensation as provided in sections 401 to 407 is deemed to have waived the employee's right of action at common law and under section 104 to recover damages for the injuries sustained by the employee.

39-A M.R.S.A. § 408. The plaintiff has not disputed the individual defendants' factual statement that Chapman & Drake, the plaintiff's employer, had secured the payment of compensation in conformity with the Maine Workers' Compensation Act at the time of the events giving rise to Count Four.[8]

"An injury arises out of employment when, in some proximate way, it has its origin, its source, or its cause in the employment." *Li v. C.N. Brown Co.*, 645 A.2d 606, 609 n.2 (Me. 1994). The temporal and spatial circumstances of the worker's sustaining of the injury determine whether the injury was incurred in the course of employment. *Hebert v. International Paper Co.*, 638 A.2d 1161, 1162 (Me. 1994). The injury is compensable if it "occurs within the period of the employment at a place where the employee reasonably may be in the performance of his duties and while he is fulfilling those duties or engaged in doing something incidental thereto." *Id.* (citation omitted).

The plaintiff argues that "there is no factual record upon which the Court may grant summary judgment" on Count Four, Plaintiff's Opposition to Horne Motion at 3, that the type of emotional distress she suffered is not compensable under the Workers' Compensation Act (and presumably that she may therefore recover for it against the employer in a separate tort action), that her emotional distress did not arise out of or in the course of her employment, and that the individual defendants

[8] The plaintiff does contend that the affidavit of defendant Gray on this point "is not competent proof" of the existence of such insurance at all relevant times, but does not explain why this is so. Plaintiff's Opposition and Supporting Memorandum re: Motion for Summary Judgment on Count IV by Defendant Blaine P. Horne ("Plaintiff's Opposition to Horne Motion") (Docket No. 25) at 3-4. This assertion, without more, is insufficient to raise a dispute concerning the factual statement, which is properly supported by the affidavit.

should be barred from invoking the Workers' Compensation Act as a bar to her claim by the doctrine of laches, specifically the employer's alleged failure to initiate a claim on her behalf under the Act, *id*. at 5-7; Plaintiff's Opposition to Chapman Motion at 9-12. None of these arguments is persuasive.

First, summary judgment is the appropriate procedural mechanism for resolution of the issue of possible preclusion of the plaintiff's claim for negligent infliction of emotional distress by the Workers' Compensation Act. It is necessary for the moving defendants to establish that insurance coverage required by the Act in order for an employer to invoke the exclusivity and immunity provisions of the Act was in place at the relevant time, and they may only do so by presenting the court with material outside the pleadings, thus making a motion to dismiss unavailable. Fed. R. Civ. P. 12(b). "If an employer subject to the Act secures the payment of workers' compensation as it is required to do, any of its employees . . . is barred from suing that employer for damages for work-related injuries, whether at common law or [otherwise]." *Beverage v. Cumerland Farms N., Inc.*, 502 A.2d 486, 489 (Me. 1985). In *Beverage*, the defendant brought a motion for summary judgment on this issue, supported by a similar affidavit. *Id*. at 487. The individual defendants argue that, accepting all of the allegations in the complaint as true, the plaintiff cannot recover as a matter of law on this claim. If the plaintiff disputes this claim, it is incumbent upon her to introduce into the summary judgment record via a properly supported statement of material facts the facts, whether disputed or undisputed, that she contends will take her claim beyond the coverage of the Act, if those facts are not already stated in her complaint. Nothing further is required of the moving parties in order to present this issue to the court for resolution.

The plaintiff's second argument is that her emotional distress is not compensable under the Act by virtue of 39-A M.R.S.A. § 201(3). That provision reads:

> Mental injury resulting from work-related stress does not arise out of and in the course of employment unless it is demonstrated by clear and convincing evidence that:
>
> > **A**. The work stress was extraordinary and unusual in comparison to pressures and tensions experienced by the average employee; and
> >
> > **B**. The work stress, and not some other source of stress, was the predominant cause of the mental injury.
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> The amount of work stress must be measured by objective standards and actual events rather than any misperceptions by the employee.
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> A mental injury is not considered to arise out of and in the course of employment if it results from any disciplinary action, work evaluation, job transfer, layoff, demotion, termination or any similar action, taken in good faith by the employer.

39-A M.R.S.A. § 201(3). The plaintiff argues that she "specifically alleges that she was harassed, intimidated, threatened, disciplined and terminated." Plaintiff's Opposition to Horne Motion at 6; *see also* Plaintiff's Opposition to Chapman Motion at 9. Nothing follows this argument, and the point the plaintiff seeks to make is less than clear. Assuming that she means to argue that because her emotional distress may not have been compensable under the Act because it arose from termination (although she certainly argues that the distress arose as well from other actions by the defendants, and she certainly alleges in her complaint that the termination was not "taken in good faith" by Chapman & Drake), and that therefore she may recover in a separate tort action, the plaintiff's argument would carve out an exception to the Act's immunity based on the compensability under the Act of only a subset of the emotional distress injuries.

The interpretation adopted by the plaintiff is not only anomalous but directly in conflict with the language of the other relevant sections of the Act. Section 104 provides that an employer who has secured coverage under the Act "is exempt from civil actions . . . involving personal injuries sustained

by an employee arising out of and in the course of employment." Section 408 provides that an employee of an employer who has secured payment of compensation under the Act "is deemed to have waived the employee's right of action at common law . . . to recover damages for injuries sustained by the employee," without any reference to the terms "arising out of" and "in the course of" employment. Contrary to the plaintiff's third argument in opposition to the motion for summary judgment, the allegations of her complaint establish that the emotional distress for which she seeks recovery did arise out of her employment, *see Ramsdell v. Naples*, 393 A.2d 1352, 1354 (Me. 1978) ("arising out of" test requires some causal connection between conditions under which employee worked and injury received; injury sustained by reason of some cause that has no relation to the employment does not arise out of it), and in the course of her employment, because it occurred within the period of employment at her place of employment, *Hebert*, 638 A.2d at 1162.[9] Therefore, the only sense in which the plaintiff's claim for emotional distress did not arise out of and in the course of her employment is the very limited sense in which section 201 limits compensability for emotional distress under the Act.

This court held in *Caldwell v. Federal Express Corp*., 908 F. Supp. 29 (D. Me. 1995), a case decided well after the effective date of section 201 — January 1, 1993 — that tort claims, including a claim for negligent infliction of emotional distress, "stemming from harassment at the workplace come within the scope of the Workers' Compensation Act and are therefore excluded" as a separate cause of action. *Id*. at 33-34. The plaintiff offers no persuasive reason why the court should depart

[9] Contrary to the plaintiff's argument, Plaintiff's Opposition to Horne Motion at 6-7, it is not the reason given by the defendants at the time for the termination of the plaintiff's employment that determines when her emotional distress occurred for purposes of the "in the course of" element of the workers' compensation test for coverage, but rather the event or events that are alleged to have caused that distress. The plaintiff does not allege that her telephone conversations at home with her co-workers were the cause of any emotional distress inflicted by the defendants.

from this position at this time.

The plaintiff's final argument on this issue is that the employer (and its owners, the individual defendants) may not invoke the exclusivity and immunity provisions of the Workers' Compensation Act because the employer failed to comply with its duty under 39-A M.R.S.A. § 302 to seek benefits for the plaintiff under the Act for her emotional distress. The plaintiff understandably cites no authority for this position, because that statute imposes no such duty on an employer. Section 302 merely sets forth the circumstances under which an employee's claim for benefits under the Act will not be barred for failure to give notice as required by section 301.[10]

The individual defendants are entitled to summary judgment on Count Four of the complaint.

C. The Motion for Leave to Amend

The current status of the plaintiff's Request for Leave to File Amended Complaint (Docket No. 9) is less than clear. The plaintiff filed a proposed amended complaint with that request. All of the defendants except Horne opposed the request insofar as it seeks to amend the claim for negligent infliction of emotional distress. Objection of Defendants to Plaintiff's Motion to Amend Complaint (Docket No. 10) at 1. There is no objection to the proposed amended complaint insofar as it seeks to attach an employment contract as Exhibit C. *Id.* However, in her next pleading filed with the court, the plaintiff stated that "she is withdrawing her first Request for Leave to File Amended Complaint, and filing a new Request for Leave to Amend with a new proposed Amended Complaint." Plaintiff's Opposition to Chapman Motion at 3. No new request for leave to amend and no new proposed

[10] If the plaintiff meant to refer to 39-A M.R.S.A. § 303, which requires an employer to report an employee's injury, that duty is triggered only after the employee has reported the injury to the employer in accordance with section 301, and the plaintiff has provided no evidence through her statement of material facts that she made such a report.

complaint have yet been filed by the plaintiff, a fact pointed out in the defendants' pleadings as early as August 3, 1998. Defendants' Reply Brief in Support of Motion to Dismiss and/or For Summary Judgment on Counts Three and Four of the Complaint (Docket No. 15) at 5. *See also* Defendant Horne's Reply Brief in Support of Motion to Dismiss or For Judgment on the Pleadings on Counts III and IV of Plaintiff's Complaint (Docket No. 29) at 5 n.4 (dated August 17, 1998).

Insofar as the plaintiff's request for leave to amend her complaint remains viable, I deny it, with the exception of the request to attach an employment contract to the complaint as Exhibit C, on the ground that the proposed amendment would be futile. The court may deny leave to file an amended complaint that would be subject to immediate dismissal under Rule 12(b)(6) for failure to state a viable claim for relief. *Hayden v. Grayson*, 134 F.3d 449, 455-56 (1st Cir.), *cert. den.* 118 S.Ct. 2370 (1998). The only differences between the initial complaint filed by the plaintiff in this action and the only proposed amended complaint filed to date by the plaintiff are the reversal of Counts Four and Five and the addition of language to the two paragraphs of the count alleging negligent infliction of emotional distress that allege that acts and omissions of the defendants involved an unreasonable risk of causing emotional distress to the plaintiff and that these acts did cause such emotional distress. Specifically, the acts and omissions, not further described in the original complaint, are defined as follows in both paragraphs of the proposed amended complaint:

> to wit, terminating Plaintiff's employment contract without the advance notice designated in the contract, and doing so in retaliation for her report of sexual harassment and in an effort to intimidate her and/or others from pursuing any further reports or complaint.

These additions have no effect whatsoever on my conclusion that the claim for negligent infliction of emotional distress is barred by the terms of the Maine Workers' Compensation Act. The proposed additions would therefore be futile, and the request for leave to amend the complaint, to the

extent that it remains viable, is accordingly denied.

IV. Conclusion

For the foregoing reasons, the plaintiff's request for leave to file an amended complaint, to the extent that it has not been withdrawn, is **DENIED**, except for attachment to the original complaint of an employment contract as Exhibit C; I recommend that the corporate defendants' motion to dismiss or for summary judgment be **DENIED**; and I recommend that the motions of the individual defendants to dismiss Count Three and for summary judgment on Count Four be **GRANTED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 2nd day of November, 1998.

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David M. Cohen
United States Magistrate Judge